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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963-4

NO. 925

WILLIAM L. HEUER, JR.

versus

CRESCENT RIVER PORT PILOTS ASSOCIATION

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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THE PROCEEDINGS BELOW

On May 20, 1963 petitioner herein, William L. Heuer, Jr., a member of the Crescent River Port Pilots' Association was tried before the Association's board of directors, pursuant to the by-laws of said association, on charges of misconduct, found guilty, and suspended from the Association for one year. The charges against petitioner arose out of an audit of the books of the Association which revealed that $237,476.51 of the Association's money was unaccounted for, the shortage having developed during petitioner's 43 months tenure as the Association's president. Of this shortage $127,550.00 was represented by checks drawn to the order of petitioner himself. Petitioner was afforded numerous opportunities to account for these funds before the hearing which resulted

in his suspension was convened, and then during the course of the hearing itself. He refused to make any accounting whatsoever, and pleaded the provisions of the Fifth Amendment of the United States Constitution as justification for his refusal to explain to his fellow members of the Association what he had done with their money during his tenure as president. Nowhere in any of the pleadings or the briefs filed by petitioner in the trial court, or the Court of Appeals for the Fourth Circuit, State of Louisiana, or the Supreme Court of the State of Louisiana, is there a word in which petitioner denies his guilt of the charges made against him by the Association. Again in his petition to this court petitioner has carefully avoided any consideration of his guilt or innocence of the charges made and proved against him.

STATEMENT OF THE CASE

From the exhibits which have been filed in their original form, it will be seen that the petitioner is complaining of the fact that he has been suspended from the Association for the period of one year. In spite of the grave nature of the charges against him, there has been no effort to expel the petitioner, because there was no provision for expulsion in the charter and by-laws of the Association. The record shows the care with which the Association's Board adhered strictly to the provisions of its charter and by-laws, in charging and trying the petitioner. Hence, the controversy concerns merely petitioner's suspension. The suspension resulted from an audit covering the affairs of the Association for the annual periods ending on June 30 of the years 1959 through 1962. The audit revealed the shortages which led the Board of Directors of the Association to prefer charges against petitioner in the form of the following letter:

"March 13, 1963

"Captain William L. Heuer, Jr.
4979 Mandeville Street
New Orleans 22, Louisiana

Dear Captain Heuer:

Pursuant to RULE 24 of the BY-LAWS, RULES and REGULATIONS of the CRESCENT RIVER PORT PILOTS ASSOCIATION, you are hereby charged with conduct unbecoming a member of the Association, conduct tending to bring discredit upon the Association, and conduct prejudicial to the best interests of the Association, in that:

1. You have while serving as President of the Association from October 22, 1958 to September 21, 1962, expended the funds of the Association without proper authority.

2. You have failed to comply with the request of the Association's Board of Directors for an accounting of the unsupported expenditures made by you during the period October 22, 1958 to September 21, 1962 as reflected in the Audit of F. W. Lafrantz & Co., Certified Public Accountants, dated November 17, 1962, copy of which has been furnished to you heretofore.

Please be advised that the Board of Directors will conduct a Hearing into these charges on Wednesday, March 27, 1963 at 10:00 A. M. You will be advised of the place of the Hearing in due course.

Yours very truly,

R. E. McNeely, President"

The audit revealed a total of $237,476.51 in expenditures for which proper support could not be found in the records of the Association. This sum is comprised of the various items which appear on Schedules 1, 2, 3, 4 and 5 of the audit (pages 28 through 40 of Exhibit Q). With

negligible exceptions all of the checks listed in these schedules were signed by petitioner and one J. H. Hanson (see page 21 of the transcript of the proceedings before the Board of Directors of the Association on May 20, 1963). The Court's special attention is requested to Schedule 2 on pages 29 and 30 of Exhibit Q which lists checks payable to petitioner himself from December 3, 1959 to May 29, 1962 in the aggregate amount of $127,550.00. No explanation whatsoever has ever been submitted by petitioner regarding his expenditure of these funds.

Petitioner was repeatedly asked for an explanation of the unsupported expenditures in the schedules referred to in the audit (see pages 25, 26, 107-110 of the transcript of the proceedings before the Association's board of Directors). Petitioner was in possession of a copy of the audit referred to in the Association's letter of March 13, 1963 as early as December 3, 1962 (page 97 of the transcript of the Association hearing), and had previously been advised of the details in the various schedules for which support was lacking at an earlier meeting of the board on or about November 2, 1962.

The hearing on the charges referred to in the Association's letter of March 13, 1963 was ultimately held on May 30, 1963 and resulted in a decision by the board as follows:

"CRESCENT RIVER PORT PILOTS ASSOCIATION

"The Board of Directors has considered the evidence offered at the hearing before the Board on Monday, May 20, 1963, and finds that the charges filed against Captain William L. Heuer Jr. on March 13, 1963 have been unequivocally proved.

Captain Heuer has refused to explain the unsupported expenditures referred to on pages 28

through 40 of the audit of F. W. Lafrentz & Co., and has relied upon the constitutional privilege against self-incrimination as a basis for refusing to tell his fellow-member pilots in a closed hearing of the Association what happened to $127,550.00.

In addition to the unexplained and unwarranted expenditure of $127,000.00, the audit is replete with expenditures for which Captain Heuer failed to submit any support or authority whatsoever. As an example, Captain Heuer rented a French Quarter apartment for "entertainment" purposes and charged it to transportation. He also incurred regular monthly expenses to one P. Cook without authority and has never satisfactorily explained what services this person performed for the association. Finally, it is clear that Captain Heuer expended on numerous occasions funds in excess of the authority of the Board of Directors.

In discharging its duties to the membership, this Board cannot overlook the fact that the audit reveals more than $200,000.00 of cash disbursements were made by Captain Heuer during his tenure as President of the Association for which no satisfactory explanation has ever been offered.

Considering all of the circumstances of this case, the Board has come to the unanimous conclusion that such disciplinary action as is authorized by the By-Laws and Rules of the Association should be invoked in this case, and it is the unanimous judgment of the Board that Captain Heuer be found guilty of conduct which is unbecoming a pilot in this Associaiton and which tends to bring discredit upon the Association and is prejudicial to its best interest, and that he should accordingly be suspended from the Association for a period of one year. It is the further unanimous judgment of this Board that Captain Heuer be assessed with the costs incident to the hearing of May 20, 1963.

/s Richard E. McNeely Pres.
/s Charles E. F. Arnoult Bd. Member
/s Paul Delesdernier V. Pres.
/s James H. Edwards, Jr. Bd. Member
/s Richard E. Walton Sec."

Petitioner, who served in a fiduciary capacity as president of the Association for the period covered by the audit, is attempting by these proceedings to maintain his right to continue as an active member of the Association in the face of his adamant refusal to explain to the membership of the Association what he did with the funds which are unaccounted for.

THE QUESTIONS PRESENTED

The questions presented are not as stated by petitioner. Petitioner bases his petition on the contention that the action of the Association was the action of the State of Louisiana. As a matter of fact, the Association is a private association, and has been so recognized by the Supreme Court of the State of Louisiana. The only questions presented by the issues in this case are (1) whether the private Association known as the Crescent River Port Pilots Association, which petitioner voluntarily joined, has the right to discipline its own members in an area involving the control of its internal affairs, and (2) whether under the facts of this case the Association has acted reasonably and fairly in conducting the hearing which resulted in petitioner's suspension.

ARGUMENT

Basic to petitioner's position in requesting this Court to act in his case is the contention that the State of Louisiana acts through the Crescent River Port Pilots'

Association and that the State has so acted herein to halt one of its own State officers in the performance of his occupation as a licensed pilot. The issues raised by this contention have long been settled. The formation of the Association is authorized by Statute. *La. Rev. Stat.* 34:995. This statute does not create the Association but merely authorized the creation. The mere legislative approval of the formation of such an Association does not make that association a creature of the State. In fact and in law, the Association is a private organization, existing with State approval but operating solely on a private basis with the right to select its members and to discipline its members pursuant to its charter and by-laws which have been in continuous existence (with necessary revision and amendment) since August 6, 1908, the date of the charter of the Association. It has been so held by the Louisiana Supreme Court, *Kotch v. Board of River Port Pilot Commissioners*, 209 La. 737, 25 So. 2d 527 (1946), and followed in the Courts of Appeal of Louisiana, *Fitzgerald v. Davis*, 160 So. 2d 345 (La. App. 1964). This Court has recognized the existence of such associations as the Crescent River Port Pilots' Association and has discussed their function as a private organization when this Court affirmed the *Kotch* case, 330 U.S. 552 (1947). Justice Black there stated at page 560 of 330 U.S. Rep'ts.,

> "The pilots were authorized to organize an association **whose membership they controlled** in order to enforce the legal regulations, and add to the efficiency of service required thereby." Citing *Levine v. Michel*, 35 La. Ann. 1131 (S. Ct. La., 1883) (emphasis supplied).

The charges which were brought against petitioner in the Association hearing concerned petitioner's fiduciary duties **to the Association** as its president. *La. Rev. Stat.*

12:36. He was asked to account to the membership for some $237,000.00 in expenditures for which he was responsible, over half of which was represented by checks payable **to his own account.**

At the hearing before the Association's Board of Directors, petitioner refused to answer the charges against him on the ground that his testimony might tend to incriminate him. The more than a quarter of a million dollars for which Heuer refused to account was not money belonging to the State of Louisiana. It was money belonging to the Association and the members thereof. Heuer's adamant refusal to testify after due notice and hearing regarding his handling of these Association funds was determined to be a breach of his fiduciary obligation to the Association which warranted suspension. *Louisiana Mortgage Corporation Inc. v. Pickens*, 167 So. 914 (La. App., 1936); *Hughs v. Department of Police*, 131 So. 2d.99 (La. App., 1961).

Heuer has been suspended, not expelled. He has not lost his membership in the Association. Membership in the Association, whether active or suspended, has no effect on Heuer's license as a pilot. This licence can be revoked only by the Governor who appointed him. *La. Rev. Stat.* 34:992. Opportunities for pilotage work are still open to Heuer, for instance, in coast-wise or river navigation. Heuer has numerous opportunities open to him to perform as a pilot. He has merely been suspended for one year from using the pilotage facilities of the Association.

Heuer voluntarily joined the Association. By so doing, he agreed to be bound by its Charter and By-laws which clearly authorize the Board of Directors of the Association to discipline its members. The By-laws and

Charter are an effective contract between the members and the Association, "* * * binding in every respect, and which they could not violate with impunity." *Lobdell v. Michel*, *supra*, 35 La. Ann. at page 1126.

Petitioner's various contentions by which he claims that he has been denied due process of law in the conduct of the Association's hearing are without merit.

It is true, as petitioner contends, that there will be a financial effect on the other members of the Association due to Heuer's suspension. This will amount to an additional income of approximately $380.00 for the entire year of the suspension for each of the other active members of the Association. The principle cited by petitioner in his brief operates to disqualify a court "* * * the judge of which has a **direct, personal, substantial** pecuniary interest in reaching a conclusion * * *." *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927). Respondent does not take issue with this principle. But the sum involved in this case can hardly be said to be **substantial** and can hardly be said to be **direct**, particularly when it is in direct proportion to the additional work which must be performed by each member, which work is assigned on an impartial, rotation basis for new and old members alike. Petitioner's argument, if correct, would preclude the authority of the Association to suspend anyone for any length of time at all.

Petitioner next contends that the fact that the Association filed a suit for an accounting against Heuer is conclusive of a showing of prejudice on the part of the Association's board members and a predetermination of the issues. It would be strange, indeed that an attempt on the part of the Association to require an accounting would be construed as such conclusive evidence of preju-

dice as to result in the inability of the Association to function under its by-laws. A reading of the transcript of the hearing shows that the Association made every effort to conduct itself in a fair and impartial manner.

It is contended by HEUER that the board of directors of the ASSOCIATION has violated a rule of the Board of River Port Pilot Commissioners which reserves to such board all disciplinary powers of pilots. It is difficult to believe that HEUER seriously urges this point. In the first place, Captain HEUER as president of the Board of River Port Pilot Commissioners convoked the meeting of the board which consisted of himself, one Richard J. Dietze and Charles P. Schwalb, Jr., for the obvious purpose of adopting an *ex post facto* provision to prevent the private ASSOCIATION of which he was a member from calling him to task for his failure to explain or account for the unsupported expenditures revealed by the F. W. Lafrentz & Co. audit. It is worthy of comment that the said Richard J. Dietze and Charles P. Schwalb, Jr., were members of the board of directors during HEUER'S tenure for the period covered by the audit and are two of the "witnesses" who refused to be sworn at the hearing. (pages 118, 119, of the Transcript of the Association's hearing). These members of the "HEUER Board of Directors" were themselves responsible for the numerous expenditures which HEUER made in excess of the board's authority as stated in Article XI of the Charter, if they were aware of them and acquiesced in them. The *ex post facto* nature of the rules adopted on May 11, 1963, would be answer enough to the contention HEUER now makes. In addition, however, the purported rules exceed the statutory authority of the Board of River Port Pilot Commissioners in that the only function of the board is as created by statute, and that function is limited to the examination of prospective pilots (La. Rev. Stat. 34:997) and the hear-

ing of complaints of conduct involving carelessness or incompetence in handling a vessel (La. Rev. Stat. 34:1001) or of conduct involving solicitation of business by a pilot (La. Rev. Stat. 34:1004). Since La. Rev. Stat. 34:995 specifically provides that river port pilots may form themselves into "an association as to them may seem fit," it is obvious that an association so formed has the right to adopt rules and regulations for the internal conduct of its affairs, particularly its financial affairs, without any interference whatsoever from the Board of River Port Pilot Commissioners.

In all aspects of the hearing, the Association acted in accordance with its by-laws and charter. The conclusion of the Association stated in its decision was responsive to the charges against petitioner in that he was found guilty of conduct which is unbecoming a pilot and which tends to bring discredit upon the Association, and which is prejudicial to its best interests.

The general rule in Louisiana, as in other states, is that the courts will not interfere with the internal affairs of an association so long as its affairs are conducted fairly and honestly and where the proceedings of the association are carried on after due notice to such persons as are concerned with said proceedings. *Elfer v. Marine Engineers Beneficial Association*, 154 So. 32, 179 La. 383 (S. Ct. of La. 1934); *State, ex rel. Rhodes Mortician & Undertaking Co. v. New Orleans Funeral Directors Association*, 108 So. 132, 161 La. 81 (S. Ct. of La. 1926); *Braden v. Lewis*, 88 So. 117, 148 La. 920 (S. Ct. of La. 1921); *Elfer v. Marine Engineers Beneficial Association*, 7 So. (2d) 409 (Ct. of App. of La. 1942); *Walsh v. New Orleans Cotton Exchange*, 188 La. 338, 177 So. 68; *New Founded Industrial Missionary Baptist Organization v. Anderson*, 49 So. (2d) 342 (La. App. 1950); *Crowder v.*

Dieu Nous Protege Benevolent Mutual Aid Association, 146 So. 710 (La. App. 1933); *Irwin v. Lorio*, 169 La. 1090, 126 So. 669 (1930); *State, ex rel. Breaux v. Longshoremen's Protective Union Benevolent Association, Local No. 231*, 123 So. 344 (La. App. 1929); *Fletcher Cyclopedia, Corporations*, Vol. 12 A, Section 5704, page 643.

CONCLUSION

The application does not involve a dispute arising out of "state action". This case is one in which a private association, acting under its charter and by-laws, has disciplined a member. If this disciplinary action had been taken without a fair and equitable hearing, petitioner would have a basis for complaint. The Association is quite willing to have its actions in this case closely examined in this regard, as it feels that the record clearly shows that every effort was made to accord petitioner a fair hearing before the Association suspended him.

Respondent prays that the petition for a writ of certiorari be dismissed.

Respectfully submitted,

S/

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CERTIFICATE

I certify that I have served a copy of this brief upon counsel for the petitioner, Mr. John M. Hofahan, this 22nd day of April, 1964.

s/ PETER H. BEER